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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966 No. 882

WALTER C. WRIGHT, JR.,
Petitioner,

v.

PRESS PUBLISHING COMPANY, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgments of the Supreme Court of New Jersey entered in the above-entitled cause on September 20, 1966 and November 1, 1966. The respondents are Press Publishing Company, Stanley Fink, William McMahon, William Green, William H. Thompson, and Michael F. Comerford.

OPINIONS OF THE COURTS BELOW

Neither of the opinions below have been reported.

JURISDICTION

The judgments of the Supreme Court of New Jersey were dated and entered on September 20, 1966, and November 1, 1966 (Appendix B, infra). The reason petitioner uses the word "judgments" is that there are two orders or "judgments" from which he hereby seeks relief, one denying his petition for certification and the other granting respondent's motion to dismiss his appeal to the New Jersey Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1257.

STATEMENT OF QUESTIONS INVOLVED

1. Whether the present action was tried in the respondents' newspaper in violation of the right of petitioner to a fair trial under Sec. 1 of the 14th Amendment to the Constitution of the United States of America.

2. Whether freedom of the press gives newspaper publishers and newsmen the privilege of publishing their interpretation of the evidence presented each day in cases in which they are parties plaintiff or defendant, particularly as to libel actions brought against them by public officials.

3. Whether newspaper publishers and newsmen have any duty to investigate the truth of their libelous charges against a public official after being put on notice that there is no truth to what they are saying and that the public official denies the charges.

4. Whether prior and subsequent publications of a defendant newspaper and other evidence tending to show hostility and the background and motivation for same, may be introduced into evidence in order to show knowledge of the falsity of particular statements or the utterance of same with reckless disregard of whether they are false or not.

5. Whether a jury may infer malice from the falsity and libelous nature of the articles themselves, rather than having to look outside the articles for other evidence of malice?

6. Whether the special privilege afforded newsmen to criticize public officials extends to cases in which there was no conduct to criticize—official or unofficial.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are freedom of the press under the First Amendment to the United States Constitution, as carried into effect by the Fourteenth Amendment; and the right to a fair trial under the due process clause of Sec. 1 of said Fourteenth Amendment. These provisions are set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

(Note: "R" refers to transcript. "P-a" refers to other appendices of petitioner)

Petitioner was elected to the office of City Councilman of Cape May, New Jersey, in October, 1960, following which election the other newly-elected councilmen chose him as Mayor. Cape May had just gone through a change in its form of government from the Commission form to the Council-Manager form, the first city manager taking office about January 6, 1961. Under the new form of government the mayor had no more power than any other councilman, all executive and administrative power being vested in the city manager. *R.S. of N.J.* 40:82-4. However, since petitioner had been one of the leaders in the movement for the change in the form of government and had helped defeat the political organization which had controlled the city for generations, he was the main target of attack by newspapers which favored the Old Regime. Respondents were, at that time, all connected in some capacity with the publication of the Atlantic City Press, the main daily newspaper circulated in the area and the only one with an office and news bureau in the county.

The 3 councilmen, all being new to office, were deluged with questions as to the difficult problems facing the city, some of which had led to the change in the form of government. The newspapers—especially the Atlantic City Press (R. 161-13)—were giving the neophytes a rough time, since the reporters would phone the councilmen individually, get their ideas on controversial subjects and then publish them as though they represented council's set policies, even though the 3 councilmen had not even had a chance to discuss them with each other (R. 189-31). Naturally, this led to uncertainty and turmoil; it was even starting to hurt business. Something had to be done and done right away.

The councilmen discussed the matter with each other over the telephone and decided to have a meeting with the various news reporters that coming Saturday to see if things could not be worked out to everybody's satisfaction.

It was at this time, January 31, ~~1966~~ 1961, that respondent Comerford, a reporter attached to the Wildwood Bureau of the Atlantic City Press, telephoned the petitioner and the following conversation ensued (R. 48-18):

> Comerford: "Hello, Mr. Wright. This is Michael Comerford of the Atlantic City Press."
>
> Wright: "Before you say anything I want to tell you that I am not going to say anything concerning the city. We have been receiving some bad publicity lately and the councilmen and I have decided not to say anything until we work out some efficient and orderly means to disperse press releases. I guess you saw what happened in the Philadelphia Bulletin Sunday."

There was more to the conversation than this, but the above is the fundamental part of it and it has been stipulated by all parties (R. 47-26).

The following day an article (P152a) appeared in the respondents' newspaper, captioned as follows:

"WRIGHT ORDERS BLACKOUT OF CAPE MAY CITY NEWS"

"GAG ACTION FOLLOWS DISPLEASURE WITH CRITICISM OF SALES TAX."

The defensive action on the part of 3 councilmen had been twisted into a "gag action" by 1 of them. Thus began a series of defamations (P152a—P155aa) which lasted from February 1 (Wednesday) to February 5 (Sunday), despite the fact that on February 1 the reporter telephoned the city manager and was told there was no blackout (R. 458-2) (which conversation was immediately relayed to the State Editor in Atlantic City); despite the fact that on February 2 plaintiff denied the blackout through the offices of the Cape May County Gazette and the Cape May Star and Wave (R. 198-22), both of which were published on February 2; despite the fact that the Editor of the Star and Wave informed the Wildwood Bureau Chief on February 2 that there was no news blackout; despite the fact that the defendants had had notice through their own newspaper of February 1 (P152a) that there was to be a meeting of the city council, city manager, and newsmen on Saturday, February 4, to discuss Cape May's publicity problems and how to handle them; despite the fact that the reporter from the Wildwood office had been invited (R. 457-32) (and later reminded) by the city manager, Jack P. Sweitzer, to attend that meeting (but failed to attend and made no inquiry concerning what had transpired (R. 457-18); and despite the fact (as defendants admit) that the telephone conversation between plaintiff and the reporter formed the sole basis of the blackout story (R. 288-29).

On February 1 (the day the first blackout story was published) respondents conducted 2 public opinion polls, and the alleged results were published the next day, side by side with the city manager's denial of the alleged black-

out. (See P153a.) In the same edition there appeared an editorial (P154a) which went even further than the blackout story, implying that the petitioner denied citizens the "right to attend public meetings and have ready access to public records." The news summary for the week had not 1 but 2 accounts of the alleged blackout, and, to top it all off, carried a picture in which petitioner had been posed to look like a dictator! (P155a.)

After all the damage had been done, the respondents came out with an inconspicuous announcement that Sweitzer had been given "control" of the news (P167a). Although petitioner threatened to bring suit on February 1, he held off for several months, hoping the respondents would stop attacking him and distorting the news about Cape May. Finally, it got so that he felt compelled to bring suit to save the city and its form of government. Petitioner's action was instituted in July of 1961. Respondents retaliated 6 weeks later with an action against petitioner. The 2 cases were consolidated for purposes of trial, and both resulted in a verdict of no cause of action. The judgments in both cases were appealed to the Appellate Division of the Superior Court of New Jersey, and both resulted in affirmance. The Per Curiam opinion as to the present case is printed in Appendix B, *infra.* Petitioner sought certification from the Supreme Court of New Jersey and also filed an appeal. The former was denied, and the latter was dismissed, as shown in Appendix B.

Petitioner petitions this Honorable Court for certiorari on 6 grounds, all of which were raised in the courts below. They were raised in the following manner and with the following determinations by the respective courts:

How Federal Questions Were Presented

I. *Questions 1 and 2* (taken together since interrelated)

A. Before trial court

1. Question 1 could not be raised until after the trial since it relates to the question of whether petitioner

was afforded a fair trial. This question and Question 2, which had been raised previously, were raised together as Points 4 and 5 on the Motion for a New Trial (not respectively but jointly, that is, each of them combining the two grounds, namely, the denial of a trial by jury and the denial of a fair trial). The question of whether respondents' publications are to be presumed to have influenced the outcome of a trial and the question of whether they actually did prejudice the outcome, are both subsumed under Points 4 and 5 of the Motion for a New Trial (and both of these question were argued on said Motion). (P118a-5 to 122a-26). These 2 points are printed at P84a and 85a, and the court's comments are at P121a-39 to P122a-26.

2. Question 2 was first raised before the Assignment Judge, the Honorable A. J. Cafiero, on the hearing of petitioner's motion to strike certain defenses and respondent's motion for change of venue. The Court instructed counsel not to try the case in the newspapers. (P120a-24 to P121a-6). Later this question was raised before the trial court during the pretrial and, still later, during the trial. Petitioner tried to get the court to prohibit respondents from publishing their versions of the proceedings in the case, especially as to the trial itself. However, the court did not believe it had the power to do anything (P122a-20) except request defense counsel to exercise some restraining influence over what their clients published each day about the trial. The Court's attention is invited to Supplemental Appendix for Appellant, 38a-15 to 39a-35 and 41a-18 to 42a-17.

3. Questions 1 and 2 were subsumed under Points 4 and 5 on petitioner's Motion for New Trial, and both of these points were argued on said motion (P118a-5 to 122a-26). The court denied the motion for a new

trial. Its ruling on these 2 points is found at P121a-39 to 122a-26.

B. Before Appellate Division

These questions were temporarily abandoned in the Appellate Division since this court denied the petitioner permission to print as exhibits on the Appeal the news articles which establish the proof of his contentions, namely: (a) Newspapers should not be permitted to print day-to-day accounts of cases in which they are involved as party litigants; and (b) petitioner was denied a fair trial by reason of said distorted accounts. Questions 1 and 2 could not have been presented without the newspaper articles as exhibits.

C. Before Supreme Court of New Jersey

Questions 1 and 2 were presented under Point 1 in the Petition for Certification and under Point 1 in the Brief on the Appeal. The court denied the Petition for Certification and dismissed the appeal without commenting upon these questions.

II. *Question 3*

A. Trial court

This question was raised on Interrogatory No. 74 Addressed to All Defendants (R.290-12), Interrogatories 25 to 30 and 58 to 59 Addressed to Thompson (P62a to 62aa), and Interrogatories 21 to 26 Addressed to Comerford (P63a to 63aa). The court struck all of these interrogatories. The hearings and the court's determinations are found on the following pages of Vol. I of the transcript:

Interrog.	*Pages*
Interrog. 74 Addressed to All Defendants	R.288-15 to 296-9
Interrogs. 25 to 30 Addressed to Thompson	R.312-16 to 317-18

Interrog.	*Pages*
Interrogs. 58 and 59 Addressed to Thompson	R.317-24 to 318-8
Interrogs. 21 to 26 Addressed to Comerford	R.318-14 to 318-28

B. App. Div.

This question was presented to the Appellate Division as Points 10, 11, and 12 in the Brief for Appellant. The Appellate Division made no comment on these points in its Per Curiam opinion affirming the judgment of the trial court (Appendix B).

C. Sup. Ct. of N. J.

This question was presented twice: first as Point 3 on the Petition for Certification, then as Point III in the Brief for Appellant on the Appeal. The Court made no comment on this Point in its Order Denying Petition for Certification or in its Order Granting Defendants' Motion to Dismiss Appeal.

III. *Question 4*

A. Trial court

At pretrial (R.1 to 46) the court excluded all the prior and subsequent publications of respondent newspaper tending to show respondents' hostility and the background and motivation for same, except for one, namely, a voters' information page on which respondent newspaper reversed petitioner's picture (as candidate for state senator) with the picture of a man named Wright who was running for county coroner (P164a). All of these proposed exhibits are in the large Appendix Vol. II. In addition to the exclusion of exhibits certain testimony was ordered stricken, such as that concerning the beginning of the controversy between petitioner and respondents (R.439-27

to 447-10), and petitioner's complaints to the city editor about the way the Wildwood Bureau was distorting the news (R.114-13 to 28). Also the Court's attention is invited to the colloquy concerning certain important letters petitioner attempted to have admitted into evidence. The letters are shown at P159a and 160a. The court's determination excluding them is contained at R.319-36 to 334-32.

B. App. Div.

This question was presented to the Appellate Division in Points 3, 4, 5, 6 and 9. The Appellate Division affirmed the judgment without ruling on these points specifically.

C. Sup. Ct. of N. J.

This question was presented to the Supreme Court on both the Petition for Certification and the Brief on appeal—Point 4 on the former and Point IV on the latter. The Court made no reference to this question in denying certification and dismissing the appeal (Appendix B).

IV. *Question 5*

A. Trial court

This question was presented to the trial court on Request to Charge #24, and was made one of the grounds for the Motion for New Trial (P87a). All Requests to Charge were declined. The ruling as to Request #24 is found at R.643-16.

B. App. Div.

This question was presented to the Appellate Division as part of Point 17 in the Brief on the Appeal and also on pg. 7 of the Supplemental Brief. No mention was made of this question in the opinion affirming the judgment (Appendix B).

C. Sup. Ct. of N. J.

This question was presented on the Petition for Certification as Point 5 and on the appeal as Point V. No mention was made of it in the Order Denying Certification or in the Order Dismissing the Appeal.

V. *Question 6*

A. Trial court

This question was presented to the trial court on Requests to Charge Nos. 21, 23, 24, 26, 30 and 31 (P86a to 88a), which follow the old law as to malice. As stated before, the trial court denied all Requests to charge (R.642-39 to 644-8). The Requests to Charge were included in the Motion for New Trial.

B. App. Div.

This question was presented to the Appellate Division as Point 17 and elaborated on later at pages 5 to 10 of Supplemental Brief. No mention was made of the denial of any of the Requests to Charge in the Opinion affirming judgment.

C. Sup. Ct. of N. J.

This question was presented on the Petition for Certification as Point 8, and on the appeal as Point VI. It was not commented upon in the Order Denying Certification or in the Order Dismissing the Appeal.

REASONS FOR GRANTING THE WRIT

1. A comparison of respondents' 9 newspaper accounts (first 9 exhibits in Supplemental Appendix for Appellant) of the trial with each day's testimony shows the reporting

of the proceedings as unfair and prejudicial to petitioner and not conducive to a just verdict. Petitioner assumes that some, if not all, of the jurors on a political libel trial will read the case in the newspapers to see what was presented to them in court, and *all* of them will be influenced (to varying degrees, of course) by public opinion resulting from the news reports. In a case against a newspaper, the jurors will be influenced mainly by the newspaper's reports because they will be unable to find any other reporting in depth. (Newspaper publishers shie away from extended coverage of libel suits, apparently because they are afraid they will give somebody the idea of bringing one against themselves. Detailed accounts are given only when there is something to be gained, as when they are personally involved as plaintiffs or defendants.)

This question has never received real consideration. The newspaper articles which form the basis of petitioner's contention that he never received a fair trial were never marked into evidence, since petitioner was unaware of the practice of introducing things into evidence on a motion for new trial. (There is nothing in the subject in the Rules of Court.) However, the articles published during the opening days of the trial were some of the most damaging, and they were read and considered by the trial court at the time they appeared in the newspaper (P122a-5). The other articles were read by the court after the trial but before the hearing on the motion for new trial (P122a-19). Since the court had heard the evidence and read the newspaper articles concerning same, petitioner thought it would be better to spend the twenty minutes allotted to him (P117a-34) for oral argument on the motion for new trial on his other grounds, one of which contained almost 100 Requests to charge. If he had plunged into an analysis of the newspaper articles, there would have been no time for anything else. Fortunately, the court let petitioner have ten minutes overtime (P121a-25),

but this still was insufficient time to present the 9 grounds adequately.

Petitioner can not see how his failure to introduce the newspaper articles into evidence prejudiced anybody. The main purpose of exhibits is not to form part of a record but to give the court and the adverse parties notice of what is before them for discussion. The court stated that it had read the articles prior to the hearing, and the respondents must be charged with notice, if not knowledge, of what the said articles contained, since they published them. Newspaper clippings are not the kind of exhibits which could be altered in some way, and therefore it was not of any real importance that they be examined or marked into evidence.

Petitioner attempted to have the articles marked as exhibits at the first stage at which it seemed important to do so, that is, in connection with the appeal. He made the motion for having them made a part of the record before he submitted his brief and appendix. (Petitioner can find no statute, court rule, or decision of the courts of New Jersey which states that exhibits may not be added to the record on an appeal.) The Appellate Division permitted no oral argument and denied the motion without comment. The Supreme Court affirmed the action of the Appellate Division, again without oral argument or comment. The proceedings are all recorded in the Supplemental Appendix for Appellant, 36a to 59a.

Petitioner seeks certiorari under the general supervisory powers of this Court.

2. Since it is difficult for newsmen to be impartial and objective in reporting matters in which they have no personal interest (such as murder trials), how can they be factual, unemotional and unbiased in reporting trials in

which they have a direct, personal interest as a party litigant? It is meaningless to say that a person has the right to a fair trial or a trial by jury if one of the parties to the controversy is the main daily newspaper circulated in the area and it is permitted to publicize its day-to-day versions of the trial.

Having experienced the heavy load of rowing against the tide of his adversaries' news reporting, petitioner endeavored before (Supplemental Appendix for Appellant, 38a-37) and during (39a-5) the course of the trial to have the tide held back. Freedom of the press would not have been curtailed by a court order; the only thing which would have been curtailed is license of the press. That the Court had the power to order the respondents to cease and desist their accounts of the court proceedings is apparent from the case of *Estes* v. *State of Texas*, 381 U.S. 532 (1965), where telecasts were forbidden. A newspaper publisher can not wear two hats at the same time: one as an independent reporter of the news and the other as a party litigant. There is too much of a conflict between the publisher's self-interest and the public's right to know.

Although petitioner alleges actual prejudice from respondents' articles, he also alleges that the practice of permitting newsmen to publish reports as to trials in which they are litigants "involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes, op. cit.* In *Rideau* v. *State of Louisiana*, 373 U.S. 723 (1963) and *Turner* v. *State of Louisiana*, 379 U.S. 466 (1965), the Court did not stop to consider the actual effect of the practice which interfered with the constitutional right to a fair trial, but struck down the conviction on the ground that prejudice was inherent in it. Plaintiff contends that the privilege of newsmen to publish day-by-day accounts of a trial where their own reputations and financial interests are at stake,

poses more probability of resultant prejudice than the telecast of proceedings over the airwaves by independent television show producers.

Every day the jury heard plaintiff's witnesses testify, and every day they received defendants' version of the events of the day before. The Court would have to look far and wide to find one single citizen who would think it fair for newsmen to publish reports of their own court cases. Now that there is so much consideration being given to the question as to the extent to which attorneys may be permitted to cause articles to be published concerning their cases, it would seem that the time has come for the consideration of the extent to which their clients should be permitted to publicize the "facts" of their cases, especially when their clients are newspaper publishers. The petitioner seeks certiorari as to this question since it is a question which has never been settled but which should be settled in the interest of justice—not only as to the present case but as to all future cases where newspapermen who are parties to the cause will try to influence the outcome through their publications, if unrestrained in advance.

3. The answer to this question seems obvious. What more appropriate way is there of proving reckless disregard for the truth (and, therefore, malice) than through the fact that no investigation was made as to the accuracy of the libelous charges. It is almost impossible to prove actual knowledge of the falsity of statements contained in a newspaper and, therefore, it is important that the Court define the types of evidence which are admissible as proof of reckless disregard.

In the case at bar an interrogatory was asked and answered as follows:

"74. Please state the names and addresses of all the officials, department heads and employees of the City

of Cape May whom each of the individuals got in touch with to check on the City Manager's statement that there must have been a misunderstanding as to the alleged news blackout, or to check on the general question of whether there was a news blackout.

"Ans. Comerford: I did not check with any of the officials, department heads and employees to check on any statement City Manager may have made concerning said blackout.

"Ans. (Thompson) Have no personal knowledge."

(No answer to this question was given by the other defendants.)

The discussion and the court's ruling as to this interrogatory are at R.288-15 to 296-9. The Court's attention is invited to P62a to P63aa for other interrogatories listed under this Point. The arguments and rulings are contained at R.312-16 to 317-18, 317-24 to 318-8, and 318-14 to 318-28.

Petitioner believes that the action of the trial court in striking these interrogatories and the action of the Appellate Division in affirming the lower court's action, constitute reversible error since the holding is in conflict with *Caldwell* v. *Crowell-Collier Pub. Co.,* 161 F.2d 333 (Cir. Ct. 5th Cir., 1947), wherein the court held that, once a newspaper publisher has notice that there is no truth in his story, he publishes it (or continues to publish it) at his peril. The fact that "attention was called to the falsity of the intended publication but it was proceeded with" despite such notice, is evidence of malice in fact (p. 336). (In the case at bar the publication of the libelous charges was continued for four days after notice that there was no news blackout had been received from the city manager.) Evidence of such notice apparently removes the publication from the protection of the law enunciated in *New York Times Company* v. *Sullivan,* 376 U.S. 254 (1964), according to p. 1454 of the Annot. on this case

contained in 95 *A.L.R.2d* 1450. In *Keogh* v. *Drew Pearson*, 244 F. Supp. 482 (U.S. Dist. Ct., D.C. 1965), the court pointed out that "there would be a time in which the publisher would be forced to investigate the truthfulness of obviously defamatory material" (p. 485) (or be guilty of recklessness for not doing so).

The question of whether a failure to investigate is evidence of the reckless disregard which constitutes malice is a question which would seem to require settling by this Court. In the *New York Times* case it was held that the failure to investigate under the circumstances of that particular case did not constitute evidence of malice, but the question of whether a failure to investigate may be considered evidence of malice has not been settled.

The importance of this question is shown by the fact that the only reason the Appellate Division could assert for affirming the lower court's judgment was the jury's finding of insufficient evidence of malice. How can a person prove malice if the court excludes all evidence of it?

4. The fact that malice must be proved through knowledge of the falsity of the particular statements or reckless disregard in regard to the truth or falsity of same, does not mean that prior and subsequent publications of defendant newspaper should not be admissable. Evidence of the decidedly pro-Republican proclivities of the respondents (and the anti-Wright proclivities) should have been admitted into evidence if only to show the background from which the intent might better be judged. For, knowledge of falsity and reckless disregard as to falsity are subjective matters, and therefore circumstantial evidence is about the only way these things can be proved. But the trial court refused to permit the introduction into evidence of prior and subsequent articles which formed the background of respondents' acts and practically all other evidence of hostility and motivation.

The decision in the *New York Times* case was rendered in the middle of the trial of the present case. Ever since that time the principles of the law as to libel actions brought by public officials against newspaper publishers has been in a state of uncertainty. What types of evidence are admissable to establish knowledge of falsity or reckless disregard? There are no guidelines on the subject, and the trial court in the present case has given the opinion in the *New York Times* case the strictest interpretation, namely, that malice may be proved only through *direct* evidence of knowledge of falsity or reckless disregard. Whether this is the correct interpretation is a question which petitioner believes should be settled at the earliest opportunity, since it is a question which will keep coming up as long as there are public officials and newspapers.

5. There is nothing in the charge to the jury (P142a-10 to 144a-30) to indicate that the falsity or libelous nature of the articles themselves is sufficient to support an inference of malice. Intrinsic proof of malice is mentioned, but no definition or examples are given. There is some talk about exaggeration and gross exaggeration, but nothing about the falsity or libelous nature of an article as giving rise to an inference of malice.

Req. No. 24 (P87a) would have filled this need. There was no reason for the court to deny this request, since it states the law both accurately and completely. And it has application to the present case, since the Appellate Division in *Walter C. Wright, Jr.* v. *Press Publishing Co.*, unpublished opinion, Docket No. A-277-62, June 10, 1963 (Appendix B, *infra*), stated that it found "no merit" to the contention that "the words complained of . . . were not libelous" or to the contention that the words were true. (The trial court, for some strange reason, found the articles to be not libelous (P149a-32).)

In the *Keogh case, op. cit.*, at pp. 484-485, it was held that, even in cases where willful falsity or recklessness

with the truth is considered the test of malice, malice can be implied "from the fact of a defamatory statement" without having to look at any "outside facts."

Petitioner contends that the denial of his Req. to Chg. No. 24 constituted prejudicial error, since he had been stripped of practically all of his proof of malice except the viciousness of the articles themselves, and even that was kept from the jury's consideration because of the court's refusal to charge this request.

Petitioner seeks certiorari, since the question of whether the language of a libelous publication may be considered in determining the intent of the publisher needs clarification. As stated in the *New York Times* case, criticism of public officials should be privileged no matter how vicious the language is. But, on the other hand, the viciousness of the language is certainly some evidence as to whether it was uttered in good faith.

6. Defense counsel admitted that his clients had based the blackout story upon the telephone conversation (R.288-29). "Our case stands or falls upon the blackout story." They offered not one single witness who had been ordered not to give out city news, who had been denied access to public records, or who had been denied the right to attend public meetings. Yet they had had the audacity to assert these things in their newspaper! The headline "Wright Orders Blackout of Cape May City news" was based on nothing more than Wright's statement to Comerford that he and the other two councilmen had decided not to discuss city news with him (or other reporters) until some orderly and efficient system had been worked out for handling Cape May's publicity problem. But there would be a meeting with reporters Saturday to try to work things out, petitioner had told him.

No sooner were the words spoken on the telephone to respondent Comerford than they were relayed to the state

editor, and he took the matter up with the editor. Then the wheels began to turn, resulting in not one libelous publication, but several; articles galore, blaring headlines, anonymous and non-anonymous polls, editorial treatment, and even a picture in "They Made the News"! Within a 24-hour period everyone was involved from the reporter on up to the vice-president and publisher. The respondents all worked together and gave the petitioner a good working-over (which is just what the Wildwood Bureau Chief had threatened (R.92-10).) Incidentally, it seems very much out of character for newspapermen to take petitioner's "word for everything" (R.454-27) and never "make any attempt to secure any news from the City of Cape May during this period of time." (R.509-16; 454-24; 564-7).

Petitioner contends that Req. to Charge Nos. 21, 23, 24, 26, 30 and 31 (P86a-88a) on the "old" law as to malice should have been granted, since the decision in *New York Times Company* v. *Sullivan,* 376 U.S. 254, 279, 84 S. Ct. 710 (1964), by its very wording applies only to cases in which a newspaper utters a "defamatory falsehood relating to a person's official conduct." There was no act upon which to comment in the present case—no conduct, official or unofficial. Petitioner, under the Council-Manager form of government has no executive power even. (R.S. of N. J. 40:82-4). Certainly the United States Supreme Court did not intend to license newsmen to fabricate stories out of the whole cloth!

— — —

The application to the present case of the principles laid down in the *New York Times* case which were based on freedom of the press, impugn the court's rulings as to the last 4 Questions if (a) the principles of the *New York Times* case are inapplicable to the present case because of there being no official conduct to criticize, or (b) the *New York Times* requirements for proof of malice were given

too strict an interpretation. Since the respondents won the case partly through freedom of the press (as shown in the charge to the jury) and since the judgment was sustained only because of freedom of the press (as shown in the Appellate Division's opinion, which applied the rule as to malice which relates only to public officials, malice being presumed from the falsity and libelous character of a publication as to everybody else), the First Amendment, as carried into effect by the due process clause of the Fourteenth Amendment, is involved in this appeal.

A libel suit against a newspaper guilty of purposely misrepresenting the facts for a political purpose, is not the same as one against a newspaper guilty of an innocent mistake, like the New York Times. Petitioner realizes that it is the general policy of the courts to discourage libel suits, but it should not discourage libel suits arising out of the concerted action of a group of newspapermen to misinform the public for political purposes.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER C. WRIGHT, JR.
Petitioner, Pro Se

December 15, 1966

APPENDIX A

First Amendment to the Constitution of the United States of America:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sec. 1 of Fourteenth Amendment to the Constitution of the United States of America:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-277-62

WALTER C. WRIGHT, JR.,
Plaintiff-Respondent,

vs.

PRESS PUBLISHING COMPANY,
et als.,
Defendants-Appellants.

Argued June 10, 1963—Decided June 27, 1963.
Before Judges Sullivan, Lewis and Labrecque.
Mr. Harry Green argued the cause for appellants (*Messrs. Arkus & Cooper*, attorneys).
Mr. Joel A. Mott, Jr., argued the cause for respondent (*Mr. Walter C. Wright, Jr.*, attorney *pro se*).

PER CURIAM

Defendants, pursuant to leave granted by this court, appeal from the denial of their motion for summary judgment. The suit, sounding in libel, grows out of the publication of certain newspaper articles and an editorial by defendant Press Publishing Company. At the time of the alleged libel plaintiff was mayor of Cape May City in Cape May County, New Jersey.

On or about January 31, 1963, defendant Michael F. Comerford, a reporter for the Atlantic City Press, a newspaper published by defendant Press Publishing Company, had a telephone conversation with Mayor Wright. The substance of the conversation is not in dispute. In it

Mayor Wright told the reporter that "We have been receiving some bad publicity lately and the councilmen and I have decided not to say anything until we work out some efficient and orderly means to disperse press releases. * * * we are not going to answer any questions by reporters until we work out some system. * * * we are not issuing any statements until we can work out some system."

Following the conversation, the Atlantic City Press printed a series of articles dealing with Mayor Wright's statements to the reporter. Excerpts from the articles are as follows:

"WRIGHT ORDERS BLACKOUT OF CAPE MAY CITY NEWS"

"Gag Action Follows Displeasure With Criticism of Sales Tax."

"CAPE CITY NEWS BLACKOUT BRINGS VARIED REACTION"

"Individuals Feel Freedom Curb; Organization Heads Approve."

"* * * the recently instituted news blackout decreed by Mayor Walter C. Wright."

Thereafter the newspaper published an editorial in which the following was stated.

"THE CAPE MAY NEWS BLACKOUT

MAYOR WALTER WRIGHT of Cape May is reported to have clamped down a news blackout on that South Jersey coast resort.

We have grown accustomed to hearing of such things from Communist dominated and totalitarian-ruled areas. But we are dismayed and shocked, to say the least, to find them going on in our own midst.

The mayor was quoted as saying that he took the action after the appearance of what he considered an unfavorable headline in a Philadelphia newspaper last Sunday.

Mayor Wright may know a great deal about administering municipal affairs. But he is showing precious little knowledge of, or consideration for, the basic constitutional guarantee of freedom of the press.

Nor is he showing any awareness of right-to-know legislation in this State, setting forth the policy that the public business is the public's business, and that citizens have a right to attend public meetings and have ready access to public records.

By what right has the mayor assumed censorship over the news and the power to suppress that which offends his personal or official sensitivities?

Or has Cape May seceded from the State and the Union?"

Following the editorial, defendant newspaper published another article referring to Mayor Wright's "order of a news blackout for his city", and commenting that "his action conflicts with the 'basic constitutional guarantee of freedom of the press' and with the 'right-to-know' laws in this state."

Defendants contend that the words complained of constituted fair comment and were not libelous at all since the allegations of fact in said publications, upon which the criticism of plaintiff's acts were based, were undisputedly true. Defendants also assert that the publications were privileged communications published on privileged occasions.

We find defendants' motion to have been properly denied. The applicable rule is stated in *Leers* v. *Green*, 24 *N. J.* 239, 254-255 (1957) as follows:

"In a word, 'fair comment' (a) must be based on facts truly stated, and (b) must not contain imputations of corrupt or dishonourable motives on the person whose conduct or work is criticised, save in so far as such imputations are warranted by the facts,

and (c) must be the honest expression of the writer's real opinion; and if the comment complies with these conditions, it is fair comment, however incorrect be the views expressed by the critic, or however exaggerated or even prejudiced be the language of the criticism; the 'limits of criticism are exceedingly wide.' *Gatley, Libel and Slander, sections* 344, 354. But criticism 'cannot be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter or not based on fact'; 'invective is not criticism.' *McQuire* v. *Western Morning News,* [1903] 2 *K. B.* 100, 108, Collins, M. R. See, also, *Dressler* v. *Mayer,* 22 *N. J. Super.* 129 (*App. Div.* 1952), Eastwood, J. A. D.

And, as has been said, it is for the judge to decide whether a communication is capable of a defamatory meaning and also, it may now be added, whether the matter commented on is one of public concern; and while it is for the jury to decide, under appropriate instructions, whether the words are allegations of fact or expressions of opinion, and, if expression of opinion, whether such expressions of opinion are fair comment or not, in every case it is first of all the duty of the judge to determine whether there is any evidence of unfairness to go to the jury."

The trial judge declined to hold that, as a matter of law, the publications constituted fair comment or were privileged. We agree.

We find no merit in the other points raised by appellants. Affirmed.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CAPE MAY COUNTY

WALTER C. WRIGHT, JR.
Plaintiff,
vs.
PRESS PUBLISHING CO. et als.,
Defendants.
Civil Action

JUDGMENT

The above entitled action having been tried before the Honorable George B. Francis, with a jury, and the Court having granted motions for judgment of dismissal, dismissed as to William Green as to counts 1, 2 and 3, dismissed as to William Thompson as to counts 3 and 4, dismissed as to Michael Comerford as to counts 3 and 4, dismissed as William McMahon as to counts 3 and 4, dismissed as to John Adams as to all counts, with costs; and the jury having returned a verdict of No Cause for Action, as to Press Publishing Co., as to counts 1, 2, 3 and 4, as to Stanley Fink as to counts 1, 2, 3 and 4, as to William Green as to count 4, as to William Thompson as to counts 1 and 2, as to Michael Comerford as to counts 1 and 2, as to William McMahon as to counts 1 and 2,

It is, on this 31st day of March, 1964,

ORDERED, that a judgment of dismissal be entered in favor of the defendant, William Green, on counts 1, 2 and 3, and in favor of the defendant, William H. Thompson, on counts 3 and 4, and in favor of the defendant, Michael F. Comerford, on counts 3 and 4, and in favor of the defendant, William McMahon, on counts 3 and 4, and in favor of the defendant, John S. Adams, on all counts, and against the plaintiff, Walter C. Wright, Jr.; and a judgment of No Cause for Action be entered in favor of the defendant, Press Publishing Co., on counts, 1, 2, 3 and

4, in favor of the defendant, Stanley Fink, on counts 1, 2, 3 and 4, and in favor of defendant, William Green, on count 4, and in favor of the defendant, William H. Thompson, on counts 1 and 2, and in favor of the defendant, Michael F. Comerford, on counts 1 and 2, and in favor of the defendant, William McMahon, on counts 1 and 2, and against the plaintiff, Walter C. Wright, Jr., With Costs.

I. GRANT SCOTT /s/
Clerk, Superior Court of New Jersey

Judgment entered this
31st day of March, 1964.

I. Grant Scott /s/
Clerk, Superior Court of New Jersey

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

ORDER DENYING MOTION

This matter coming on to be heard in the presence of Walter C. Wright, Jr., plaintiff-appellant, Pro Se, and HARRY GREEN, of Counsel, and SAUL W. ARKUS of ARKUS AND COOPER, attorneys for defendants-respondents, on motion of plaintiff-appellant for an order permitting the plaintiff-appellant to print certain items in the Appendix on this Appeal, as set forth in Notice of Motion dated November 28, 1964; and the Court having examined the motion papers and briefs;

It is, on this 7th day of December, 1964, on motion of Arkus and Cooper, attorneys for defendants-respondents, ORDERED that motion of plaintiff-appellant is denied.

FOR THE COURT:
EDWARD GAULKIN /s/
PJAD

Consented To As To Form only

WALTER C. WRIGHT, JR. /a/
Plaintiff-Appellant, Pro Se

SUPREME COURT OF NEW JERSEY

ORDER DENYING MOTION FOR LEAVE TO APPEAL

This matter having been duly presented to the Court, it is Ordered that the motion for leave to appeal is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 7th day of January, 1965.

JOHN H. GILDEA /s/
Clerk

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-879-63

WALTER C. WRIGHT, JR.,
Plaintiff-Appellant,

v.

PRESS PUBLISHING COMPANY, *et als.*,

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

Defendants-Respondents.

Argued March 28, 1966—Decided July 13, 1966
Before Judges Gaulkin, Labrecque and Brown.
On appeal from Superior Court, Law Division, Cape May County.
Mr. Walter C. Wright, Jr., plaintiff-appellant, argued the cause *pro se*.
Mr. Harry Green argued the cause for defendants-respondents (*Messrs. Arkus & Cooper*, attorneys; *Mr. Green*, on the brief).

PER CURIAM

Plaintiff appeals from a judgment in favor of defendants and from denial of his motion for a new trial. The jury determined that publication of the alleged libelous matter was without actual malice and such finding finds adequate support in the record. *Kulbacki* v. *Sobchinsky*, 38 *N. J.* 435 (1962). We accordingly affirm. *New York Times Co.* v. *Sullivan*, 376 *U. S.* 254, 84 *S. Ct.* 710, 11 *L. ed. 2d* 686, 95 *A. L. R. 2d* 1412 (1964).

No costs.

APPENDIX

SUPREME COURT OF NEW JERSEY
C-31 September Term 1966

WALTER C. WRIGHT, JR.,
Plaintiff-Petitioner,

vs.

PRESS PUBLISHING COMPANY, et al.,
Defendants-Respondents.

On Petition for Certification

ORDER DENYING PETITION

TO APPELLATE DIVISION, SUPERIOR COURT:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 20th day of September, 1966.

JOHN H. GILDEA, Clerk
Clerk of the Supreme Court

A TRUE COPY
JOHN H. GILDEA
Clerk

SUPREME COURT OF NEW JERSEY

M-86 September Term 1966

WALTER C. WRIGHT, JR.,
Plaintiff-Appellant,

vs.

PRESS PUBLISHING COMPANY,
Defendant-Respondent.

ON

MOTION TO DISMISS APPEAL.

This matter having been duly presented to the Court, it is Ordered that the motion to dismiss appeal is granted.

WITNESS, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this first day of November, 1966.

JOHN H. GILDEA, Clerk

A TRUE COPY
JOHN H. GILDEA
Clerk

SUPREME COURT, U. S.

FILED

JAN 18 1967

JOHN F. DAVIS, CLERK

No. 882.

IN THE

Supreme Court of the United States

October Term, 1966.

WALTER C. WRIGHT, JR.,
Petitioner,

v.

PRESS PUBLISHING COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ARKUS & COOPER,
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Deal, N. J. 07723.

Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

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Gatley on Libel and Slander, (5th ed-1960), pp. 563-574 21

Odgers on Libel and Slander, (6th ed-1929), pp. 282, 560 21

Restatement Torts (negligence), p. 1291, Ch. 19, Secs. 500-503, N. J. Pocket Supp., p. 294 20

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1966.

No. 882.

WALTER C. WRIGHT, JR.,

Petitioner,

v.

PRESS PUBLISHING COMPANY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR RESPONDENTS IN OPPOSITION.

JURISDICTION.

Respondents deny that there is jurisdiction under 28 U.S.C.A. Sec. 1257, in that alleged constitutional issues were neither presented to the trial court, nor to the Appellate Division, and Petitioner conceded at least that they were "temporarily" abandoned in the Appellate Division (p. 7:1). The Statement of the Questions Involved that he presented to the Supreme Court of New Jersey were different than those that he presented to the Appellate Division, so that it is a fictitious appeal—different than the one he took from the Law Division to the Appellate Division.

He sought advisory opinion before Supreme Court of New Jersey.

AS TO STATEMENT OF QUESTIONS INVOLVED.

The "Statement of Questions Involved" in petition (pp. 2 & 3) are entirely different from those stated in his Brief on Appeal to the Appellate Division in New Jersey. As brief not filed here, it was as follows:

"1. Was verdict against weight of evidence?

Did Court Err In:

"2. Dismissing complaint?

"3. Excluding evidence of initial hostility?

"4. Striking testimony of notice to defendant of unfair news reporting?

"5. Excluding carbon copies of letters which put editor on notice?

"6. Excluding prior and subsequent publications?

"7. Excluding evidence of defendants' treatment of real news blackouts?

"8. Excluding certain evidence of malice?

"9. Excluding evidence of political motivation?

"10. Striking an interrogatory concerning defendants' failure to investigate?

"11. Striking interrogatories concerning City Manager's denial of news blackout?

"12. Striking interrogatories concerning plaintiff's denial of news blackout?

"13. Striking certain requests for admission?

"14. Refusing to strike Fifth Defense until after certain evidence?

"15. Refusing to dismiss First Count of complaint in case consolidated with present case, until after verdicts had been returned?

"16. Charging jury as to meaning of 'malice'?

"17. Refusing Requests to Charge indicated in Motion for New Trial?

"18. Excluding certain evidence of diminution of earnings?

"19. Excluding evidence of election returns?"

It will be noted that it did not contain the questions raised here and no Federal question. Questions must have been raised below, otherwise not open in proceeding on petition for certiorari so as to give this court jurisdiction. *Rule 23, 1(f); Ellis v. Dixon,* N. Y. 1955, 75 S. Ct. 850, 349 U. S. 458, 37, 350 U. S. 855, 100 L. Ed. 759."

Respondents submitted Counterstatement of Questions, not filed here by Petitioner either, as follows:

"1. In an action for libel, by a public official against a newspaper and its staff, based upon criticism of plaintiff's admitted action as Mayor in cutting off public news, where there was no evidence of known falsity or

recklessness of factual statements published so as to constitute 'actual malice', and jury found no malice and no causes of action, and trial judge dismissed action, was there error?

"2. Were the words complained of libelous?

"3. Were the words complained of true?

"4. Did the words complained of constitute, in any event, Fair Comment?

"5. Did the words complained of also constitute privileged communications and on privileged occasions?

"6. Were the words complained of, not libelous *per se,* and did plaintiff sustain or allege special damages?

"7. Did the words complained of, if defamatory and if published with 'actual malice', reflect on the plaintiff as a public official—councilman and mayor—on the other councilmen and the community and/or city, and/or did the plaintiff seek recovery of damages for the benefit of the city, and does such an action lie?

"8. Did the Court err in the respects pointed out in plaintiff's statement of questions involved?"

These are the questions on which the appeal was submitted, argued and decided by the Appellate Division.

In New Jersey, "Statements of Questions Involved" on appeals are contained in briefs and constitute and limit questions considered by the Appellate Courts. (Rules Governing The New Jersey Courts, *Rule 1:7(c)).*

Petitioner disregarded his Statement of Questions in his Petition for Certification to the Supreme Court of New Jersey and set forth a new Statement of Questions. Oddly, he did not file this important paper either, to show jurisdiction under *Rule 23, 1(f).*

And when certification was denied, petitioner proceeded

with appeal and sought a double review by Supreme Court of New Jersey by an alleged constitutional issue which was neither presented to the Trial Court, nor to the Appellate Division, and which he expressly abandoned, even though he said "temporarily" in the Appellate Division, and which did not constitute a "substantial constitutional issue" at all.

And, in his brief thereon, he changed "Statement of Questions Involved" again. Supreme Court dismissed this appeal.

Oddly again, he did not file the new statement here, although important to show compliance with *Rule 23, 1(f).*

And before your Honorable Court, petitioner states questions that are different than those before the Supreme Court of New Jersey.

STATEMENT OF THE CASE.

The statement of petitioner is so inadequate and distorted that it is necessary for respondents to restate case.

May we refer to the petitioner as the plaintiff?

Plaintiff is a lawyer and was the Mayor of the City of Cape May when the articles sued on, were published, and he instituted this action for libel on July 24, 1961.

Defendants-Respondents are PRESS PUBLISHING COMPANY, STANLEY FINK, WILLIAM McMAHON, WILLIAM H. THOMPSON, and MICHAEL COMERFORD, who were the owner, editor, state editor, bureau chief and reporter respectively, of the *"ATLANTIC CITY PRESS"*.

Judgment in favor of defendants and against plaintiff based upon jury verdict and special findings, was entered on April 2, 1964, there were intermediate appeals on various aspects of action at every stage of these long drawn out proceedings.

There was appeal therefrom by plaintiff to the Appellate Division on May 18, 1964.

The appeal was by plaintiff from judgment of no causes of action on 4 counts of his Amended Complaint, upon special findings of jury (1) that the publications were not libelous, (2) that defendants established the defense of truth, (3) that the defendants were not guilty of 'actual malice' and (4) that the defendants established the defense of Fair Comment; and from judgment of dismissal of the complaint and action by the Court after the return of the jury.

Also appeal from order denying plaintiff's motion to set aside verdict of jury and for new trial.

The underlying facts were substantially undisputed.

There was substantially no dispute or question of fact, of what the plaintiff said to the newspaper reporter, Michael F. Comerford, defendant, about the so-called "blackout" of news of the city and what the defendants published.

The subject of the 4 counts of the Amended Complaint alleged to be false by the plaintiff, were summarized in the headline, sub-headline and the first paragraph of the article in the Cape May County edition of the Atlantic City Press of February 1, 1961 (Ex. P-1, Vol. 11 P 152a), as follows:

> "WRIGHT ORDERS BLACKOUT OF CAPE MAY NEWS.
>
> "Gag Action Follows Displeasure with Criticism of Sales Tax.
>
> "Cape May—A news blackout has been put into effect in this city until 'an orderly and efficient means can be worked out to disperse press releases to newspapers', Mayor Walter Wright announced Tuesday."

In essence, the alleged libel resided in the term "blackout" and that plaintiff ordered it, based upon the underlying facts which were admitted substantially.

The articles only referred to the plaintiff as a public official, namely, a councilman and Mayor: there was no reference to him otherwise.

Defendants take issue with plaintiff's statement that he was "constantly harassed by newspapermen, particularly the defendants" (Pp. 2:10). There was no such proof. What prompted plaintiff in refusing to give reporter Comerford information, appears in the admitted telephone conversation, as follows:

> "Comerford, 'Hello, Mr. Wright. This is Michael Comerford of the Atlantic City Press.' Wright, 'Before you say anything I want to tell you that I am not going to say anything concerning the city. We have been receiving some bad publicity lately and the councilmen and I have decided not to say anything until we work out some efficient and orderly means to disperse press releases. I guess you saw what happened in the Philadelphia Bulletin Sunday.'"

The refusal was reiterated in the rest of the conversation (P IV Tr 223-227).

It is to be noted that the bad publicity was not in defendants' newspaper, but in the Philadelphia Bulletin.

It was conceded from the outset "that the telephone conversation between plaintiff and the reporter formed the sole basis of the blackout story". (Admitted by plaintiff, Pp 3:14.)

The 2d publication was about a poll taken of the Mayor's refusal to give out news concerning the City (P 11 153a, Ex. P-2). Plaintiff's opposition thereto was principally to the term "news blackout" (P IV Tr 299-237).

The 3d publication was editorial based upon the "news blackout" story (P II 154a, Ex. P-3).

The 4th and last publication appeared in a Sunday col-

umn, *"What Happened in our Town"*, which summarized the previous articles (P II 155a, Ex. P-4).

The basic issue between plaintiff and defendants was whether his action constituted a "news blackout" of municipal affairs of Cape May City.

This situation was in effect during the publication of said articles, so far as the plaintiff was concerned (P IV Tr 186:19-21).

Plaintiff testified that his definition of "blackout" in these circumstances, in the case of a withholding of news, would be a "cutting off" (P IV Tr 187:1, 11).

He also testified that in the context of the story that "gag action" and "blackout" were synonymous terms (P IV Tr 190: 19-22).

Plaintiff conceded that it could be held that defendants proved a "dim-out", but that this was short of a "blackout", because *Webster* defined "blackout" as "total darkness" (Psb 11:23), and, as to it being "something of a temporary character, not necessarily. Could last for a year. There is no necessity to be temporary" (P IV Tr 187:22).

REASONS FOR DENIAL OF WRIT OF CERTIORARI.

(1) Plaintiff's Statement of the Questions Involved are different than those presented to Appellate Courts of New Jersey.

(2) Constitutional issues were neither presented to the trial court, nor to the Appellate Division of New Jersey. In fact, plaintiff states that they were "temporarily abandoned in the Appellate Division".

(3) The doctrine of New York Times Co. as to "actual

malice", appears clear and does not appear to require further guidelines; and, it is submitted that it was not a Constitutional issue.

(4) Plaintiff raised academic questions of privilege in self-reporting by newspaper of judicial proceeding involving it and malice, which are without support in record of trial court or of Appellate Division, and which involved no judicial action in said courts, and sought advisory opinion.

ARGUMENT.

The Petition for Writ of Certiorari should be denied, because—

(1) It presents a case to your Honors that is different in substantial and important respects if not wholly, from the case presented to the Appellate Courts of New Jersey.

(2) The alleged Constitutional issues were neither presented to the trial court, nor to the Appellate Division, and plaintiff conceded at least that they were "temporarily abandoned in the Appellate Division" (Pp 7:1).

Plaintiff did not attempt at the trial or before the Appellate Division to prove that he was denied a trial and fair trial under the State and Federal Constitutions. He did not attempt to do so in his motion for a new trial (Pp 10:15).

Plaintiff has misstated that he sought to introduce as exhibits on appeal, which he claimed prejudiced his said rights (Pp 11:6): he never raised the point formally or during trial, and the Appellate Division denied his motion which was merely for permission to print exhibits even

though they were not offered at the trial without stating any legal reason or ground (appdx on Petition for Certification, P 26a, 36a).

And he did not offer said exhibits on his motion for new trial. (See particularly (*Id.*, 39a:36 to 40a:7).) The Appellate Division denied the motion (*Id.*, 56a), and the Supreme Court of New Jersey, on Motion for Leave to Appeal therefrom, denied same on January 7, 1965 (*Id.*, 59a:25).

In a *"Note"* in his Petition to the said Supreme Court (Pp 14), plaintiff referred to the rule of "actual malice" as defined by this Honorable Court in *New York Times Co. v. Sullivan,* 376 US 254, 84 S. Ct. 710, 11, L ed 2d 686, 95 ALR 2d 1412 (1964), and stated that the last 6 Points (3 to 8) were concerned with the proper interpretation of the Rule or kinds of evidence admissible to show malice (14:20).

Plaintiff stated that the first 2 points involved "purely constitutional questions" which he contended to be appealable, i.e., whether newsmen have privilege to publish day by day accounts of court trials in which they are engaged (4:21).

Then for the first time and before the Supreme Court of New Jersey, he offered "9 exhibits to show that a fair trial is virtually impossible when the defendant newspaper publishes its version of the daily proceedings" (5:3-5).

First: May it be noted that the trial took 19 days, from February 13th to March 24, 1964. There were 19 or 20 articles and plaintiff offered 9, so it is fair to infer that the other 10 or 11 were unobjectionable. The 9 articles offered were published during the first half of the trial period. Plaintiff has never pointed out anything objectionable in said 9 articles.

At the argument of plaintiff's motion for a new trial, April 10, 1964, Judge Francis, trial Judge, said (P 53a:10

to 54a:9), that plaintiff cited no grounds; only 2 issues of the newspaper were called to his attention; that on the first day when jury was selected plaintiff complained about February 14, 1964 article entitled "JURY PICKED FOR CAPE LIBEL TRIAL", (id 5a), because defendants made it appear that freedom of press was at stake, while plaintiff's attorney objected because the article reported that consolidation of the 2 cases for trial had been agreed when it had not (id, 41a:28-36); and

that "Mr. Wright's counsel attempted to prevail upon Mr. Wright that there was nothing in the article which was in any way detrimental * * * found something wrong with the idea that the consolidation had been consentual rather than by order, to which Mr. Wright replied, and I think properly, that this was trivial, so that we even had disagreement between Mr. Wright and his counsel as to whether or not there was anything improper in that first issue. I did not read the issues during the trial" (id, 53a: 27-37).

Plaintiff said that "the case was not concerned with freedom of the press, but rather with the question of whether freedom of the press had been abused. * * * that it was prejudicial for the defendants to make it look like freedom of the press was involved, when there was merely a suit for libel. * * *. The Court could see nothing prejudicial about this article nor the article we showed the Court the next day, which quoted a great deal from the openings to the Jury" (id, 39a:14-25).

The affidavits of plaintiff and his attorney were never submitted to the trial court, and were presented for the first time with the notice of motion to the Appellate Division for permission merely to print the articles in the Appendix.

It seems that they were straining at gnats, while swallowing camels, because the opening paragraph of the article

was justified by our questioning of each prospective juror "if he or she believed in Freedom of the Press in general. Each replied in the affirmative" (id, 5-25); and

as to the alleged unfairness of the February 19, 1964 article, entitled "DUAL LIBEL SUIT BEGINS AT CAPE" (id, 7a), because "the article destroyed the strength of my (plaintiff's attorney) opening to the jury and gave Mr. Harry Green's opening such forceful presentation that I felt it could not help to have an effect on the jury" (id, 42a-8).

Said article contained copious quotes from both attorneys and embraced what both counsel said in open court to the jury, and wholly within the record of this case.

Plaintiff has not pointed out a single thing therein which was not said by counsel in open court at the time before the Court and jury, and as stated in the article. If it was otherwise, it is suggested that plaintiff would have transcribed the openings and incorporated in the record.

Absolutely nothing is shown in the other 6 articles of an unfair or inaccurate character, and he has not asked to include other 9 or 10 articles of the trial series.

Attention is called to Mr. Arkus' affidavit on the same motion as to care that the Press used in assigning an experienced reporter from another county, the Courthouse at Mays Landing, Atlantic County, to cover the trial in Cape May County Courthouse and to report only what transpired in open court (P 31a:19-31).

As for the first 2 Points, which plaintiff said "involve constitutional questions," (4:21) ——

He sought under Point I, "certification so that he will have the opportunity to prove that he was denied a trial by jury * * * and also a fair trial" (10:11-20).

First, he had the opportunities in the trial court and before the Appellate Division, but did not see fit to do so.

On the merits, he has not pointed out anything in his

Petition showing anything inaccurate or unfair. His petition is completely silent on same.

It is submitted that a newspaper has the right to publish the report of a judicial proceeding, and it is qualifiedly privileged if the report was full, fair and accurate, "although the report contains matters that would otherwise be defamatory and actionable, and no action will lie therefor except on proof of malice in making it." (*Rogers v. Courier Post Co.*, 2 N. J. 393, 402 (1949).)

Petitioner talks about a denial of a "fair trial" in the abstract and in a vacuum.

What petitioner complains of, is that the newspaper published reports of the trial, to which it was a party.

First, may it be reiterated that he did not raise the issue at the trial or before the Appellate Division.

At the motion for a new trial, plaintiff stated "this question had never been presented before, and actually it is the question I am the most interested in, * * *, from not only my own standpoint but from an academic standpoint." (Vol. I, App. Div., P 118a:5-9).

He then delivered a rambling dissertation that human nature precludes impartiality by a newspaper about itself (id., 9-29), and "I don't think that the newspaper should be permitted to print the story of what happened at the trial" (id., 29-32).

"I know there is no rule that applies so far as newspapers are concerned, but I think there should be a rule of law established along that line and I don't think it would take legislation to do so. I think the Supreme Court could establish such a rule" (id., 36-40).

PETITIONER SEEKS ADVISORY OPINION.

It is submitted that what the plaintiff seeks is the use of this case as a vehicle for an advisory opinion on this proposition of law, even though it prolongs this already old litigation. Your Honorable Court has said that it is without power to give advisory opinions, and its practice is not to decide abstract hypothetical, or contingent questions. *Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory,* Ala. 1945, 65 S. Ct. 1384, 325 U. S. 472, 89 L. Ed. 1725.

And petitioner gives no consideration to the 1st Amendment of the Federal Constitution, or to the rule of privilege in reporting a judicial proceeding, even if newspaper is a party, and simply states it as an *ipse dixit.*

Petitioner cited in support, *Estes v. Texas,* 381 U. S. 532, 85 S. Ct. 1628 (1965). There is no comparison. It is submitted that *Estes* was decided wholly on the injection of the trial judge permitting the trial to be telecast against Estes' objections after a formal hearing thereon before the trial. Your Honorable Court scored the telecasting of the trial and the intensity of the publicity on Estes, and that it inherently prevented a sober search for the truth; that during the trial even the judge was harassed by the television operations and conditions became so bad, and upon further objections by defense counsel, the judge ordered that defense counsel and their argument should not be televised which made the trial so confusing to the jury, the participants and viewers by the changing day-to-day orders of the judge, that this resulted in presentation of only the State's side of the case, to the further prejudice of the defendant Estes' conviction was reversed because of the effect of telecasting upon the fairness of criminal trials.

There was a much later case by your Honorable Court dealing with newspaper trial publicity, decided 1 year after *Estes*—only seven months ago, which we thought that plaintiff would also cite—*Sheppard v. Maxwell*, 384 U. S. 333, 16 L ed 2d 600, 86 S. Ct. 1507, 34 Law Week 4451, decided June 6, 1966. Justice Clark wrote for the majority and said that the publicity from all media created a Roman Holiday throughout the pendency of the case with the greatest excesses committed by them without any control by the trial judge. Because of such publicity of the most prejudicial kind, defendant made motions for change of venue, continuance and mistrial, but they were denied.

No such motions were made by plaintiff during trial.

Justice Clark's opinion carefully pointed out the position and role of the press in these situations. They also touch upon the constitutional field plaintiff seeks to encroach and for the first time on appeal. However, plaintiff omitted any reference thereto.

The Court said:

> "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.' *In re Oliver*, 333 U. S. 257, 268 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '*(w)hat transpires in the court room is public property.*' *Craig v. Harney*, 331 U. S. 367, 374

(1947). The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society.' *Bridges v. California*, 314 U. S. 252, 265 (1941). And *where* there was *'no threat or menace to the integrity of the trial,' Craig v. Harney, supra*, at 377, *we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism."*

* * * * * * * *

"'Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.'"

" * * there is nothing that proscribes the press from reporting events that transpire in the courtroom."* (Emphasis added.)

The Court referred to certain excesses that occurred at the *Sheppard* trial, some as follows:

"* * * bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."

* * * * * * * *

"Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein."

"Much of the material printed or broadcast during the trial was *never heard from the witness* stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty * * *."

* * * * * * * *

"Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that 'misrepresented entirely the testi-

mony' in the case. Under such circumstances, the judge *should have at least warned the newspapers to check the accuracy of their accounts."*

None of these things occurred at bar.

In his affidavit on motion before the Appellate Division, he said (P 39a, on Certification, 23-29):

"The Court could see nothing prejudicial about this article (referring to freedom of the press) nor the article we (he and his attorney) showed the Court the next day, which quoted a great deal from the openings to the Jury. *The Court did caution the attorneys for defendants to look the articles over before they were published to prevent them from being too extreme."*

Undersigned counsel did look them over. Harry Green, of counsel, did so, and made answering affidavit as follows (Id. 54a:12-25):

"We made no suggestions to the newspaper reporter assigned to report the trial and the first we would know about it would be when we read the articles in the newspaper on the following day. *They appeared to be completely objective and factual reports of the trial to us, the Court and outside of 1 or 2 criticisms, to counsel who tried the case for Mr. Wright.*

"Mr. Wright concedes that the *exhibits* which he seeks to add were *not offered* either at the time of trial or on the Motion for a new trial, except as to the articles of February 14 and 19, 1964, which he suggests that he offered but 'no stenographic notes taken' thereof. *We deny any such offer."*

Plaintiff also sought to appeal as a matter of right the 6 last points which did not have constitutional questions on their face, but that constitutional question of extent of free-

dom of the press was implicit in same, because he felt that even though your Honorable Court in *New York Times Company* simplified the definition of malice, you laid down no guidelines "what kinds of evidence may be introduced" (Pp 5:22, 19:1).

He then proceeded to embrace the trial errors reviewed by the Appellate Division under this broad mantle of a constitutional issue (6:1).

He neither raised any constitutional issue in the trial court or before the Appellate Division, and without any factual record either in the trial court or in the Appellate Division to support same.

As to the trial errors, which do not appear in the Statement of Questions Involved in the Petition, but which were in the Statement before the Appellate Division, we treated same in our Briefs before the Appellate Division, and they did not involve Federal questions.

On the assertion of plaintiff, that your Honorable Court laid down no guide-lines "as to what kinds of evidence may be introduced to prove malice under the new definition" (Pp 5:23, 19:1), plaintiff's statement seems untenable.

The definition defines "actual malice" in 2 alternate parts, (1) knowing falsehood, or (2) reckless falsehood.

These categories have existed in this State for many years and cases have been tried thereunder.

(1) *Raymond v. Cregar*, 38 N. J. 472, 482 (1962); *State v. Browne*, 86 N. J. Super. 217 (App. Div. 1965); *Lawless v. Muller*, 99 N. J. L. 9, 11 (Sup. Ct. 1923), and numerous other cases.

(2) What is "reckless" has come up in numerous cases prior thereto.

Guidelines for both classes appear in the decisions of our

Appellate Courts, and it is suggested that the definition is not only "simplified", but its guidelines are, too.

Your Honorable Court did not define "reckless" in *New York Times*, but you did say that negligence in publication did not constitute "actual malice".

The Appellate Courts of this State (New Jersey) have dealt with "reckless" in analogous situations. Until our Supreme Court (N. J.) wiped out the distinction between "invitee" and "licensee" in personal injury case, it was necessary to establish in the latter that the defendant owed no duty except to abstain from acts wilfully injurious. *Faggioni v. Weiss*, 99 N. J. L. 157, 158 (EA-1923).

It is submitted that this is apposite to "reckless".

In *Rose v. Squires*, 101 N. J. L. 438 (SC-1925), the trial judge referred to willfulness as "that a thing is done recklessly with intent and without just cause or excuse." The Supreme Court (N. J.), in reversing, said (p. 440):

> "The necessary effect of this instruction seems to be that if the jury found Campbell guilty of gross negligence in driving, as it was claimed he did, they were at liberty to charge him with an act of willful injury if his passengers were hurt as a result of such negligence. But there is a substantial distinction between mere negligence, albeit gross, and willful injury."

Reversal aff'd., *sub nom Rose v. Campbell*, 102 N. J. L. 449 (EA-1926).

In *Staub v. Public Service Railway Co.*, 97 N. J. L. 297 (EA-1922), it was defined as follows (p. 300):

> "To establish a willful or wanton injury it is necessary to show that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the in-

> jurious result. * * * There was therefore no evidence of willful or wanton injury which entitled the plaintiff to a submission of this question to the jury."

The term "reckless disregard" is used in the *Restatement, Torts (negligence),* p. 1291, Ch. 19, Secs. 500-503, N. J. Pocket Supplement, p. 294, which distinguishes it from negligence, even gross, and as the Justices, both affirming and dissenting, did in *Rose,* at pp. 451, 459, "there is a substantial difference between mere negligence, albeit gross, and willful injury."

> "Gross negligence is simply a degree of negligence, and remains within the realm of negligence."

In *King v. Patrylow,* 15 N. J. Super. 429 (AD-1951), author of the opinions in *New York Times, Garrison v. Louisiana and Rosenblatt v. Baer,* (Justice Brennan, then a member of the New Jersey Supreme Court), said (at p. 433):

> "The element of intent to harm the plaintiff is supplied, however, under the rule in effect in this State (other jurisdictions follow different principles, see *Restatement, Torts,* Scope Note, secs. 500-503 (1934) by a constructive intention as to the consequences, which, entering into the intentional act, which produces the injury, the law imputes to the actor regardless of whether or not he intended to harm the person, so that a charge which otherwise would be mere negligence, becomes, by reason of *reckless disregard* of the safety of the other, a willful wrong."

So that when Justice Brennan, in majority opinion, used the term in the monumental free press opinion in *New York Times,* it may be that he used it in the sense of a willful wrong as defined in the New Jersey cases.

In a dental malpractice case, citing *Rose* in support, the

Court said: (*Eatley v. Mayer*, 9 N. J. Msc. 918 (1931), aff'd., 10 N. J. Msc. 219 (SC-1932).

> "There is a distinction between gross negligence and willful and wanton disregard of the rights of others. Gross negligence does not support a charge for punitive damages, while a charge of willful and wanton disregard does support such a charge. The test is the intent with which the act is committed."

And the jury in the action at bar, in which certiorari is sought, expressly found no "actual malice" and so did the Trial Judge when he, after jury, decided reserved motion of defendants to dismiss the action because there was no evidence of "actual malice".

Moreover, there is a wealth of Libel and Slander law and literature on "actual malice" over the centuries in this State and Country and in England. For example, *Coleman v. Newark Morning Ledger Co.*, 29 N. J. 357, 373 (1959); *Gatley on Libel and Slander*, 5th ed.—1960, pp. 563-574, and *Odgers on Libel and Slander*, 6th ed.—1929, pp. 282, 560, and how to prove it, to name a few.

If anything, the U. S. Supreme Court simplified and reduced it to 2 concrete situations, and certainly established guidelines for same.

CONCLUSION.

It is submitted that the decision of the Supreme Court of New Jersey is correct. The New Jersey Courts from Trial level to the highest Appellate level gave this case the most careful consideration throughout the years when petitioner exhausted every avenue on every phase.

WHEREFORE, Defendants-Respondents respectfully pray that writ of ceritorari be denied.

Respectfully submitted,

ARKUS & COOPER,
By: SAUL W. ARKUS,
Counsel,
Attorneys for Defendants-Respondents.

HARRY GREEN,
Of Counsel and on Brief.

Dated: January 13, 1967.

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No. 882.

IN THE

Supreme Court of the United States

October Term, 1966.

WALTER C. WRIGHT, JR.,

Petitioner,

v.

PRESS PUBLISHING COMPANY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

REPLY BRIEF.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

REPLY BRIEF.

AS TO RESPONDENTS' STATEMENT OF QUESTIONS INVOLVED.

Petitioner agrees with respondents: the "Statement of Questions Involved" in this petition is different from the "Statement of Questions Involved" contained in the brief filed with the Superior Court of New Jersey, Appellate Division. The first two questions were omitted entirely from the brief filed with the latter tribunal. The other questions were presented, but not as Federal questions. This Court is already familiar with the reason why petitioner temporarily abandoned the first two questions at the intermediate appellate level; there is no use in presenting arguments if the court refuses to consider the evidence (p. 8 of Pet.). The other four questions were presented as non-constitutional questions because that is all they were until the Appellate Division rendered its opinion, changing the picture, as will appear.

In the petition (p. 18) it is stated that the trial court gave the opinion in the case of *New York Times Company v. Sullivan*, 376 U. S. 254 (1964), "the strictest interpretation, namely, that malice may be proved only through *direct* evidence of knowledge of falsity or reckless disregard." This is a misstatement. At the time the trial court ruled on the interrogatories (involved in Questions 3 and 4), the *Times* case had not even been decided. It was decided on March 9, 1964, whereas the interrogatories involved in the present appeal had all been ruled on by February 27, 1964. (R. 318-28 contains the last reference to them.)

Since the trial court's rulings on the interrogatories were not based on the principles enunciated in the *New York Times* case, there were no constitutional questions concerning Questions 3 and 4 when the appeal was taken to the

Appellate Division. Nor were there any constitutional questions concerning Questions 5 and 6, since the trial court, in denying the pertinent requests to charge, had given no reasons for his rulings and, therefore, it could hardly have been contended that said Requests had been denied because of the application to them of the principles set forth in the *New York Times* case.

When the Appellate Division got finished with the case, what had before been non-constitutional questions had been turned into constitutional questions, since it based its whole decision (p. 10a of Pet.) on the *New York Times* case. The case of *Kulbacki v. Sobchinsky*, 38 N. J. 435, 185 A. 2d 835 (Sup. Ct., 1962) was also cited, but it was cited merely for the proposition that an appellate tribunal will not reverse a jury's finding where "such finding finds adequate support in the record." Therefore, the one sustaining pillar of the Appellate Division's decision is the *New York Times* case, and, if the holding in that case is insufficient authority for the affirmance of the trial court's action in striking petitioner's interrogatories and denying his requests to charge, the judgment should be reversed.

The petitioner raised these constitutional questions at the first opportunity: on the Petition for Certification filed with the Supreme Court of New Jersey. He also raised them on the appeal to that court, but, unfortunately, it dismissed the appeal without getting into the merits.

The reason these questions are constitutional ones is that the decision in the *New York Times* case rests on freedom of the press. If freedom of the press was not involved in the present case, or if the principles of the *Times* case were too broadly interpreted (and, therefore, improperly applied), it is hoped that this Court will correct the miscarriage of justice. For, as pointed out in the *Times* case (at p. 285):

> "This court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."

The fact that the Appellate Division was applying the principles of the *Times* case and not just its prestige is apparent from the use of the term "actual malice" instead of just plain "malice". This is a term which has no significance in the law of libel except where there is a question concerning punitive damages or a case to which the rule of the *New York Times* case applies. Since there was no specific question involving punitive damages, the Appellate Division must have been referring to the term as used in the *Times* case. As he has already indicated in the closing pages of his petition, the petitioner does not think the rule of the *Times* case was meant to be applied to cases in which no public act was involved (but merely a private conversation in which the petitioner was telling a newshawk "No comment"). However, if the ruling of the *Times* case is to be applied, petitioner hopes it will be applied with a mallet instead of a sledgehammer. In the petitioner's opinion, the *Times* case established the rule that malice could not be inferred from the falsity of a libelous publication, not that you have to prove knowledge or reckless disregard through direct evidence.

Since the respondents contend that the questions presented in the present petition are different from the questions presented to the Supreme Court of New Jersey, the petitioner is filing ten copies of the Petition for Certification filed with that court and ten copies of his Brief on the appeal (and also ten copies each of the Brief and Supplemental Brief filed with the Appellate Division). It is petitioner's belief that it would have been improper for him to have filed these papers as part of the record, since briefs (including petitions for certification, judging from the way

they are prepared in New Jersey) are not considered part of the record. Stern & Gressman, *Supreme Court Practice* (3rd Ed., 1962), p. 225. And, if they are not part of the record, they certainly are not to be quoted from or summarized under Rule 23, 1 (f).

AS TO RESPONDENTS' STATEMENT OF THE CASE.

Respondents allege that the petitioner's Statement of the Case "is so inadequate and distorted that it is necessary for respondents to restate case" (p. 5). If it is so inadequate and distorted, why did respondents not point out some of the defects? The only specific criticism is directed at words which do not even appear in the Petition, [redacted] Respondents assert (at p. 7) that they take issue with petitioner's statement "that he was constantly harassed by newspapermen, particularly the defendants' (pp. 2:10). There was no such proof." Petitioner invites the Court's attention to R. 189-31 to 190-10, containing the following cross-examination of petitioner by defense counsel:

> "Q. But you don't say that is false?
>
> A. No, but the main reason the move was taken wasn't to eliminate conflicting statements, but to prevent the press from tearing us apart by getting statements from each person, putting them in the newspapers. This is what Cape May is going to do, when we didn't even know ourselves yet, and it puts everybody in a state of confusion.
>
> Q. I don't want to get into a lot of semantics and fancy words. Isn't that phrase that you just referred to substantially what you said in a telephone conversation with Mr. Comerford? Let's look at it in a big way.

A. It is part of it, but the main purpose is to prevent them from taking a statement from me or one of the other councilmen and putting it in the newspaper and saying this is the policy of the council, when the council hasn't met yet, so it comes in as part of it when we haven't had a chance to meet and decide, but the main purpose is to eliminate these news articles tearing the town apart."

That the trouble emanated mainly from the respondents is apparent from petitioner's testimony at R. 161-13, which reads: "The displeasure was something that had been going on for quite a while and it was with the Atlantic City Press . . ."

If anybody's Statement of the Case is distorted, it is the Respondents.' At p. 8, right after referring to "a 'news blackout' of municipal affairs of Cape May City," Respondents state: "This situation was in effect ~~during the~~ publication of said articles, so far as the plaintiff was concerned." The situation which was in existence during the publication of said articles was not "a news blackout of municipal affairs of Cape May City" (as respondents would have the Court believe), but rather a situation of the petitioner and probably the other two councilmen refusing to comment on matters of policy until they worked out some system of dispersing press releases. If the Court will read the question (at R. 157-13) which precedes petitioner's statement, it will realize that the respondents could not possibly have thought that the petitioner was referring to the situation described in their brief. And, if the Court wishes to see under what circumstances "gag action" and "blackout" would be synonymous terms (p. 8), its attention is invited to R. 159-33. (The citations in respondents' brief are to the typewritten transcript, not to the printed version.)

Psb 11:23 (at p. 8 of respondents' brief) refers to petitioner's Supplemental Brief on the appeal to the Appellate

Division. Ten copies of this are being filed at this time so that the Court can see for itself what was conceded by the petitioner. Item #45 on p. 11 states that "the *most* that the defendants could be held to have proved was a 'dim-out' (concerning council's policies for the future). . . ." (Emphasis added). If there was a "dim-out," it was only a dim-out as to council's plans for the future until the councilmen had had a chance to work them out.

AS TO RESPONDENTS' ARGUMENT.

At p. 10 of their brief, respondents state that "the trial took 19 days, from February 13th to March 24, 1964." This is true, but it was a consolidated trial. Testimony in the action with which the present appeal is concerned was completed by March 12 (as shown at R. 634-27). The rest of the time was devoted to respondents' action against the present petitioner.

The 19 or 20 articles referred to by respondents must refer to the articles as to both actions. Respondents (at p. 10) state that, since petitioner offered only nine articles, "it is fair to infer that the other 10 or 11 were unobjectionable." This is not a valid inference. Petitioner would hardly be permitted to offer articles which relate to the other action. Both actions were tried together, but they are considered as separate actions on the appeal.

Respondents state (at p. 10) that petitioner "has never pointed out anything objectionable in said 9 articles." Have they read the brief petitioner filed on appeal to the Supreme Court of New Jersey? The question concerning the prejudicial effect of these newspaper articles has never been considered on the merits.

As to respondents' contention that having a newspaper

gives them the privilege to publish a daily account of their own trial, petitioner urges the Court to consider the following guidelines recently adopted by the bar and the press in the State of Washington (as reported in "Landmark Guidelines by Bar and Press", *Trial*, Dec./Jan. 1966-67, p. 62):

> "Litigants in civil causes, including causes having special news value because of public interest, are as much entitled to a fair trial by an unbiased jury as is a criminal defendant, . . .
>
> Jurors summoned to decide questions on civil liability or damages should be free from public clamor *and special influences.*" (Emphasis added.)

Freedom of the press does not require that newsmen be permitted to fight their court cases out in the newspapers; justice does require that they be restrained from doing so.

Respectfully submitted,

WALTER C. WRIGHT, JR.,
Petitioner, Pro Se.

Dated: February 6, 1967.